Case No. 81-6419

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

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SUPREME COURT, U.S.

MARK MIKENAS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI IN THE SUPREME COURT OF FLORIDA

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COUNSELS FOR RESPONDENT

TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
STATEMENT OF THE CASE AND FACTS	1-2
ARGUMENT	3-5
REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI	
CONCLUSION	5
CERTIFICATE OF SERVICE	5

TABLE OF CITATIONS

	PAGE
Armstrong v. State, 399 So.2d 953 (Fla. 1981)	3
Brown v. State, 381 So.2d 690 (Fla. 1980) cert. denied 449 U.S. 1118, 101 S.Ct. 931, 66 L.Ed.2d 847 (1981)	4
Drake v. Zant, 449 U.S. 999, 66 L.Ed. 297	5
Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398 (1980)	3
Lamadline v. State, 303 So.2d 17 (Fla. 1974)	4
Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973	3
Maggard v. State, 399 So.2d 973 (Fla. 1981)	4
Martin v. Louisiana, 449 U.S. 998, 66 L.Ed.2d 197	5
Mikenas v. State, 367 So.2d 606 (Fla. 1979)	2
Mikenas v. State, 407 So.2d 892 (Fla. 1982)	1
State v. Dixon, 238 So.2d 1 (Fla. 1973)	4
State v. Shaw, 255 Se.2d 799 (S.C. 1979) cert. denied 444 U.S. 957, 100 S.Ct. 437, 62 L.Ed.2d 329 (1979)	3
Wainwright v. Stone, 414 U.S. 21, 38 L.Ed.2d 179 (1973)	4
Westbrook v. Balkcom, 449 U.S. 999, 66 L.Ed.2d 298	5

OPINION BELOW

The Opinion of the Florida Supreme Court sought to be reviewed is reported as Mikenas v. State, 407 So.2d 892 (Fla. 1982)

STATEMENT OF THE CASE AND FACTS

On November 3, 1975, the appellant, Mark Mikenas, his brother, Vito Mikenas, and a friend, Mark Rinaldi, robbed a convenience store in Tampa, Florida. During the robbery the appellant carried a .38 caliber revolver. There were no customers in the store during the robbery. Upon entering the store, the appellant and his co-felons forced the lone store clerk into a back room of the building. Unknown to the robbers, Gary Baker, an auxiliary deputy sheriff, observed the robbery from a hidden position in the store. When an automobile unexpectedly arrived at the front of the store, appellant and his co-felons tried to exit the store through a back door. Baker, with drawn pistol, stopped them and placed them under arrest.

Seconds later, Anthony Williams, an off-duty Tampa policeman in civilian attire, came into the store through the front door. Baker called to Williams for help and informed him that a robbery was underway. Immediately thereafter, appellant and Baker fired at each other with both missing. Baker later killed Vito and wounded the appellant as they ran towards the front of the store. As appellant was falling to the floor, he shot and killed Anthony Williams, the Tampa police officer. Ann Williams, the wife of Anthony Williams, herself a police officer in uniform, arrested appellant. Baker arrested Rinaldi.

The indictment charged the appellant and Rinaldi, in two counts, with first-degree murder of Anthony Williams and with second-degree murder of Vito Mikenas who "was killed by a person or persons other than the person or persons engaged in the perpetration or attmept to perpetrate said robbery..."

The appellant pleaded guilty to murder in the first-degree for the death of Anthony Williams and pleaded nolo contendere to the charge of second-degree murder of his brother, Vito. Appellant reserved the right to appeal the applicability of Section 782.04(3), Florida Statutes (1975), the second-degree felony murder statute, to the facts of this case. The judge adjudged appellant guilty, and jury selected for the sole purpose of recommending sentence, rendered a recommendation of death. The judge sentenced appellant to death.

The Florida Supreme Court affirmed petitioner's conviction but remanded for resentencing, without further jury de.iberations, ecause the trial judge considered a nonstatutory aggravating factor. Mikenas v. State, 367 So.2d 606 (Fla. 1979) Petitioner was again sentenced to death and he appealed alleging a new jury should have been impanelled. Both the judgment and sentence were affirmed. Mikenas v. State, 407 So.2d 892 (Fla. 1982)

This petition follows.

ARGUMENT

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The Petition for Writ of Certiorari should be denied because no substantial federal constitutional question is presented.

First of all, it must be noted that, as the Florida Supreme Court held, no improper evidence was submitted to the jury, 407 So.2d 892, at 893. The defect found in the first appeal requiring a remand was the trial judge's erroneously placing on the weighing scale as an aggravating factor the defendant's substantial history or prior criminal activity. 367 So.2d 606, at 609-610; 407 So.2d 892, at 893. The information itself was not nonstatutory or unconstitutional. Florida Statute 921.141(i) (1975) provides:

> "In the proceeding, evidence may be presented as to any matter that the Court deams relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated...."

A consideration of the character of the accused, good or bad, presumably is constitutionally required. Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973 (1978)[1]

Any alalogy to Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398 (1980) must fail. There the death penalty rested on a single aggravating factor which this Court found to have been to broadly defined to pass constitutional muster. In the instant case the sentencing trial judge found multiple statutory aggravating factors and a single possible mitigating factor. 407 So.2d 892, at 893.[2]

1/ Even nonstatutory factors relevant to the character of the accused may be considered by the sentencer. State v. Shaw, 255 Se.2d 799 (S.C. 1979) cert. denied 444 U.S. 957, 100 S.Ct. 437, 62 L.Ed.2d 329 (1979)

2 Cf. Armstrong v. State, 399 So.2d 953 (Fla. 1981) holding that a possible mitigating factor is not a sufficient finding of the presence of that factor.

Even assuming arguendo an improper aggravating circumstance was considered, the Florida Supreme Court has held death is appropriate where there are other good aggravating circumstances. See Brown v. State, 381 So.2d 690 (Fla. 1980), cert. denied 449 U.S. 1118, 101 S.Ct. 931, 66 L.Ed.2d 847 (1981).

Petitioner argues that the jury improperly considered such matters as aggravating factors. In Florida, it is the trial judge who imposes sentence; the jury only recommends. State v. Dixon, 283 So.2d 1 (Fla. 1973); Lamadline v. State, 303 So.2d 17 (Fla. 1974) In addition, the jury did not consider as an aggravating factor petitioner's prior history of criminal activity. A review of the jury instructions showing that they were informed that the aggravating factors to be considered were limited to the eight statotory aggravating factors. (R492-494). We do not presume the jury violated their oath to consider the case without obeying the trial court's instruction on the law.

Mikenas then attempts to have this Court act as a supplemental reviewer of state law questions by suggesting that the Florida Supreme Court misapplied Maggard v. State, 399 So.2d 973 (Fla. 1981). In reply, respondent answers that questions of state law are resolved by state courts. Wainwright v. Stone, 414 U.S. 21, 38 L.Ed.2d 179 (1973) And Maggard, supra., is inapplicable. That case stands for the proposition that where a defendant stipulates that a certain mitigating factor is specifically waived and will not be asserted the state may not introduce rebuttal evidence to show the absence of that mitigating factor. In the instant case, trial defense counsel did not specifically stipulate that he would waive the applicability of mitigating circumstance 6(a) of F.S. 921.141. Without such a stipulation the state may offer evidence to rebut the presence of a potential mitigating factor, especially where such evidence is highly relevant to the character of the accused.

The evidence pertaining to petitioner's prior history of criminal activity was properly admissible because relevant to Mr. Mikenas's character and tending to rebut potential statutory

mitigating factor 921.141(6)(a). The trial court did not err in the weighing process following the remand from the Florida Supreme Court.[3]

CONCLUSION

The Petition for Writ of Certiorari should be denied for the failure to demonstrate the existence of a substantial federal constitutional question.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to William C. McClain, Esq. 495 N. Carpenter Street, Bartow, Florida on this 6th day of May, 1982.

Of Counsel for Respondent

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3 Even if the sentencing judge did commit an error in the calculas, where, as here, the appellate court can determine that such error is insignificant affirmance of the death sentence would be appropriate. Brown v. State, supra. See also Westbrook v. Balkcom, 449 U.S. 999, 66 L.Ed.2d 298; Drake v. Zant, 449 U.S. 999, 66 L.Ed. 297; Martin v. Louisiana, 449 U.S. 998, 66 L.Ed.2d 297.